IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-741406-D3
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Adrian A. McGARRY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1860

Adrian A. McGARRY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 28 February 1969, an Examiner of the United States Coast Guard at Seattle, Washington, suspended Appellant's seaman's documents for eight months upon finding him guilty of misconduct. The specifications found proved allege that while serving as an oiler on board SS METAPAN under authority of the document above captioned, Appellant:

(1) on 13 and 14 December 1968, failed to perform duties at Yokohoma, Japan, and at sea;

(2) on 14 December 1968, at sea, did "wrongfully turn in approximately 30 mins. past midnight on your 12-4 A.M. watch at sea"; and

(3) on 14 December 1968, at sea, wrongfully had in his possession a 40 oz. bottle containing 8 oz. of whiskey.

Appellant did not appear at the hearing. The Examiner entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of METAPAN and the testimony of one witness.

There was no defense.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. the Examiner then entered an order suspending all documents issued to Appellant for a period of eight months.

The entire decision was served on 24 December 1969. Appeal was timely filed in January 1970. Although Appellant had until 3 April 1970 to add to his appeal he has submitted no matter in

addition to his original notice.

FINDINGS OF FACT

On 13 and 14 December 1968, Appellant was serving as an oiler on board SS METAPAN and acting under authority of his document. As to the specifications of the charge I quote the Examiner's ultimate findings:

"1. That on December 13 and December 14, 1968, the Person Charged did wrongfully fail to perform duties aboard the SS METAPAN while that vessel lay at the port of Yokohoma and [was] at sea."

(I make no findings as to the matter of possession of intoxicants.)

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that Appellant's inability to have the master testify in his behalf should be somehow considered and that Appellant's exemplary conduct renders an eight month suspension too severe.

APPEARANCE: Appellant, pro se.

OPINION

I

Appellant's first point, that he was deprived of the opportunity to have the master of the vessel testify in his behalf, is without merit. When served with the notice of hearing and advised of his right to have subpoenas issued he made no request for a summons to a witness. He did not even appear for the hearing himself, although the Examiner, on his own motion, granted a six day delay in proceedings should Appellant, who did not appear on notice, make a later appearance.

Appellant cannot complain now that his own default deprived him of a benefit, nor does his assertion now that his failure to appear in February 1969 was "an act of stupidity on my part" elicit sympathy since Appellant somehow evaded service of the Examiner's decision for ten months.

II

Appellant's asserted exemplary record is not impressive either, when it is considered that six months of the eight months' suspension ordered here were included in the order because the misconduct found proved here was a violation of a previously ordered probation.

III

One other error, not mentioned by Appellant, requires corrective action, for two reasons.

The second specification found proved alleged that Appellant did "wrongfully...turn in approximately 30 mins. past midnight on your 12-4 A.M. watch at sea." Apart from finding this specification proved, the Examiner made no findings on this episode. The alone was error. But the plain wording of the specification means that Appellant "turned in" one half hour after the watch began. This would mean that one half hour after the watch began, Appellant either abandoned his watch and went to bed or, never having reported for watch, went to bed. In his "OPINION," the Examiner has this to say of the matter:

> "The testimony of one witness, the junior engineer was uncontradicted to the effect that shortly before midnight on December 4, 1968, while the SS METAPAN was at sea, he did in fact attempt to awaken the Person Charged and called him for the watch. His testimony was to the effect that he called McGarry twice before the Person Charged finally appeared in the engine room to perform his duties." An examiner's opinion cannot be the repository of his findings of fact, but even if this statement were couched in the terms of a finding the specification, as lodged, was not proved. It may be that the specification was intended to allege that Appellant "remained turned in until 30 mins. after his watch period began" and a proper finding by the Examiner might have saved the allegation as proved. It may be that the specification was intended to allege that Appellant failed to "turn to" for 30 minutes. (The difference between "turn in" and "turn to" need not be elaborated.)

The fundamental error, however, is that the Examiner made no finding on the issue at all. The second error is that even if the Examiner's opinion, framed as a finding of fact, resolved the issue, there is no offense of "being turned in" or "failing to turn to" in the second specification found proved which is any different from the failure to perform duties on 14 December 1968 alleged and found proved in the first specification.

IV

The third specification found proved was supported in the record only by an official log book entry. This entry was not made in substantial compliance with the statutes in that it does not appear that Appellant was ever informed of the making of the entry or of its contents.

CONCLUSION

I conclude that the second specification found proved in this case is a duplicitous statement of part of the allegations of the first specification found proved. The propriety of the Examiner's order is not affected by this ruling, but the second specification found proved must be dismissed.

ORDER

The findings of the Examiner entered at Seattle, Washington on 28 February 1969 are AFFIRMED except as to his finding on the third specification found proved, which is SET ASIDE. The second specification found proved, as to which no findings were made by the Examiner, and the third specification found proved, are DISMISSED. The order of the Examiner is AFFIRMED.

T. R. SARGENT
Vice Admiral U. S. Coast Guard
Acting Commadant

Signed at Washington, D. C., this 8th day of October 1971.

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